

Appl. No. 09/499,871  
Amdt. Dated May 16, 2007  
Reply to Office Action of February 16, 2007

### **REMARKS/ARGUMENTS**

Claims 1-50 are pending in the present application.

This amendment is in response to the Office Action mailed February 16, 2007. In the Office Action, the Examiner rejected claims 21-30 under 35 U.S.C. §101; claims 21-30 under 35 U.S.C. §112; claims 1, 2, 6-8, 11, 12, 16-18, 21, 22, 26-28, 31, 32, 36-38, 41-42, and 46-48 under 35 U.S.C. §102(e); and claims 3-5, 9, 10, 13-15, 19, 20, 23-25, 29, 30, 33-35, 39, 40, 43-45, 49, and 50 under 35 U.S.C. §103(a). Applicant has amended claim 21. Reconsideration in light of the amendments and remarks made herein is respectfully requested.

#### ***Rejection Under 35 U.S.C. § 101***

In the Office Action, the Examiner rejected claims 21-30 under 35 U.S.C. §101 because the claimed invention is directed to non-statutory subject matter. The Examiner states that the computer readable medium, as disclosed in the specification, includes a radio frequency link, which clearly is not a patentable subject matter. Applicants respectfully traverse the rejection for the following reasons.

*First*, Computer readable media including radio frequency links, signals, carrier waves, etc., do not render the claims non-statutory. Electromagnetic signals or carrier waves may be invisible to human eyes, but they are tangible. For example, optical signals are formed by photons and electromagnetic signals carry energy. They may have momentum and can exert pressure. The energy carried by an electromagnetic wave is proportional to the frequency of the wave. Certainly, these signals are tangible in that they can exert pressure on an object. Furthermore, a RF refers to that portion of the electromagnetic spectrum in which electromagnetic (EM) waves can be generated by alternating current fed to an antenna. An electromagnetic wave carries energy and momentum which may be imparted when it interacts with matter. An EM wave may consist of particles called photon. These elements are clearly tangible and concrete. They do not represent an abstract idea.

*Second*, the Examiner has not recited any authority, either in the MPEP or case laws, to support his contention. Under 35 U.S.C. §101, processes are non-statutory if they consist solely of mathematical operations without some claimed practical application (i.e., executing a "mathematical algorithm"); or simply manipulate abstract ideas without some claimed practical

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application. Here, the claims recite a physical medium that contains program code to perform useful operations with practical applications in media processing, not mathematical operations or abstract ideas.

*Third*, it appears that the Examiner is already applying the interim examination guidelines recently proposed and still under evaluation, by the USPTO that characterize signal claims as non-statutory subject matter. The USPTO argues that a signal is not a process, composition of matter, machine, or article of manufacture. The signal has "no physical structure" and does not "itself perform any useful, concrete, and tangible result" and therefore is a non-statutory natural phenomenon. "These interim guidelines propose that such signal claims are ineligible for patent protection because they do not fall within any of the four statutory classes of Sec. 101. Public comment is sought for further evaluation of this question." See Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility, 1300 OG 142 (November 22, 2005).

This proposed USPTO interim guideline on signal claims is still being evaluated, with public comment being sought for the evaluation. The USPTO recently published the public comments as of August 11, 2006 in response to the *Request for Comments on Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility* published in the Federal Register at 71 Fed. Reg. 34307 (June 14, 2006)

<http://www.uspto.gov/web/offices/pac/dapp/opla/comments/ab98/ab98.html>

Public comments indicate that there is a strong opposition to the USPTO's proposition. For example, Rick D. Nydegger presents the following comment:

"There are sound policy reasons why a signal or carrier wave used to provide software to users should be treated no differently for purposes of patent eligibility than a computer disc such a CD or floppy disk. It is highly questionable whether a signal or carrier wave is not "tangible" in any event. Simply because one cannot see or touch the medium does not change the reality that such a medium nonetheless is real and is used every day to transmit and download software just as effectively as software contained on a CD. Thus, to deny patent eligibility for such claims is to ignore the reality that such media is most certainly employed in the using and selling of software carried by such a medium, and thus denies claims to a patent owner that would otherwise provide a basis for asserting direct infringement against competitors, thereby relegating such subject matter to

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assertions of indirect infringement only, with no sound policy basis for doing so. To deny such computer program products of patent protection on this basis appears to be exalting form over substance. Moreover, treating so-called "signal" claims differently from other kinds of computer readable media (e.g., that wireless signals are not tangible, and cannot tangibly embody a computer program or process since a computer cannot understand/realize (i.e. execute) the computer program or process when embodied on the data signal) is equally as true for other media such as floppy disks or CDs. Executable instructions on a disk or CD, like those carried by a signal, also cannot be understood or executed until those computer-executable instructions are read from the disk or CD into the computer's RAM. This is no different for a carrier signal, and hence the asserted factual distinction as to "tangibility" simply lacks merit."

Applicants' position is in line with Nydegger's comment. Applicants do not agree with the USPTO's proposition that an electromagnetic signal does not have a physical structure and does not itself perform a useful, concrete, and tangible result. This type of signal does have a physical structure though not visible to the naked eye and does itself perform a useful, concrete, and tangible result.

*Fourth*, the USPTO had determined that signal claims are statutory. Before the publication of this proposed interim guideline, training materials distributed by the USPTO to teach how to use the examination guidelines for computer-related inventions in effect since March 29, 1996 (MPEP, Chapter 21, section 2106) included a signal claim example listed as Example 13 under Automotive Manufacturing Plant. The claim example was "A computer data signal embodied in a carrier wave comprising a compression source code segment comprising [the code]; and an encryption source code segment comprising [the code]." The example was accompanied by an analysis of the claim and the signal claim was determined to be statutory subject matter. Furthermore, in Appeal No. 2002-1554 in the case of *Ex parte Rice* (Application 08/003,996), the Board of Patent Appeals and Interferences reversed an examiner's rejection of signal claims as being directed to non-statutory subject matter under 35 U.S.C. §101, holding that electromagnetic signals, although "transitory and ephemeral in nature", are statutory subject matter.

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*Fifth*, numerous US patents have been granted having claims explicitly directed to carrier wave. The following are only a few examples:

US Patent No. 7,131,101 (issue date: October 31, 2006): Claim 3.

US Patent No. 7,130,596 (issue date: October 31, 2006): Claim 30.

US Patent No. 7,130,368 (issue date: October 31, 2006): Claim 7.

US Patent No. 7,127,275 (issue date: October 24, 2006): Claim 12.

US Patent No. 7,089,168 (issue date: August 8, 2006): Claim 4.

US Patent No. 5,877,775 (issue date: March 2, 1999): Claim 15.

US Patent No. 5,850,449 (issue date: December 15, 1998): Claim 20.

The Examiner has not cited any authority that the specified claims in the above issued patents have rendered invalid because they are non-statutory as directed to carrier wave.

However, to expedite the prosecution of the application, Applicants have amended claim 21 to limit the computer useable medium to a computer storage medium.

Accordingly, Applicants submit that claims 21-30 are statutory under 35 U.S.C. §101 and respectfully requests the rejections be withdrawn.

### ***Rejection Under 35 U.S.C. § 112***

In the Office Action, the Examiner rejected claims 21-30 under 35 U.S.C. §112, first paragraph, as failing to comply with the enablement requirement. The Examiner contends that claims 21-30 call for "a computer program product...", while the specification talks about the software implementation in a very general term. The Examiner concludes that the support in the specification is inadequate for the computer program product claims 21-30 (Office Action, page 3, paragraph number 5). Applicants respectfully traverse the rejection for the following reasons.

First, the standard for determining whether the specification meets the enablement requirement was cast in the Supreme Court decision of *Mineral Separation v. Hyde*, 242 U.S. 261, 270 (1916) which postured the question: is the experimentation needed to practice the invention undue or unreasonable? That standard is still the one to be applied. *In re Wands*, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed. Cir. 1988). Accordingly, even though the statute does not use the term "undue experimentation," it has been interpreted to require that the claimed invention be enabled so that any person skilled in the art can make and use the

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**invention without undue experimentation.** *In re Wands*, 858 F.2d at 737, 8 USPQ2d at 1404 (Fed. Cir. 1988). See also *United States v. Teletronics, Inc.*, 857 F.2d 778, 785, 8 USPQ2d 1217, 1223 (Fed. Cir. 1988) ("The test of enablement is whether one reasonably skilled in the art could make or use the invention from the disclosures in the patent coupled with information known in the art without undue experimentation."). The test of enablement is not whether any experimentation is necessary, but whether, if experimentation is necessary, it is undue. *In re Angstadt*, 537 F.2d 498, 504, 190 USPQ 214, 219 (CCPA 1976). Furthermore, as long as the specification discloses at least one method for making and using the claimed invention that bears a reasonable correlation to the entire scope of the claim, then the enablement requirement of 35 U.S.C. 112 is satisfied. *In re Fisher*, 427 F.2d 833, 839, 166 USPQ 18, 24 (CCPA 1970).

The claimed invention focuses on a technique to re-route connections using redundant path connections and loopbacks. Claim 1 recites, inter alia, "[a] computer program product comprising a computer storage medium having computer program code embodied therein for re-routing connections between first and second nodes in a network switch, the computer program product having: computer readable program code for connecting the first and second nodes by a loop-back path . . . ." The Specification provides ample support for the claim, including at least one method for making and using the claimed invention. See, for example, Specification, page 8, lines 16-27; page 9, lines 1-5:

"The mass storage device 350 provides a mechanism to read machine-readable media. When implemented in software, the elements of the present invention are essentially the code segments to perform the necessary tasks. The program or code segments can be stored in a processor readable medium or transmitted by a computer data signal embodied in a carrier wave, or a signal modulated by a carrier, over a transmission medium. The "processor readable medium" may include any medium that can store or transfer information. Examples of the processor readable medium include an electronic circuit, a semiconductor memory device, a ROM, a flash memory, an erasable ROM (EROM), a floppy diskette, a compact disk CD-ROM, an optical disk, a hard disk, a fiber optic medium, a radio frequency (RF) link, etc. The computer data signal may include any signal that can propagate over a transmission medium such as electronic network channels, optical fibers, air, electromagnetic, RF links, etc. The code segments may be downloaded via computer networks such as the

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Internet, Intranet, etc.” (Specification, page 8, lines 16-27; page 9, lines 1-5. Emphasis added.)

The Specification, therefore, provides full support for claims 21-30.

Second, the Examiner has not shown that if any experimentation is necessary, it is undue. Methods of storing computer program codes on computer readable media are well known in the art. Computer readable media containing program codes are commercially available everywhere. Furthermore, the Examiner has not shown that the specification does not disclose at least one method for making and using the claimed invention that bears a reasonable correlation to the entire scope of the claim.

Accordingly, the rejection under 35 U.S.C. §112, first paragraph, as failing to comply with the enablement requirement, is improperly made.

Therefore, Applicants respectfully request the rejection under 35 U.S.C. §112 be withdrawn.

#### ***Rejection Under 35 U.S.C. § 102***

In the Office Action, the Examiner rejected claims 1, 2, 6-8, 11, 12, 16-18, 21, 22, 26-28, 31, 32, 36-38, 41-42, and 46-48 under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 6,627,107 issued to Rochberger ("Rochberger"). Applicants respectfully traverse the rejection and submit that the Examiner has not met the burden of establishing a prima facie case of anticipation.

Applicants reiterate the arguments set forth in the previously filed Response to the Office Action.

Rochberger discloses a method of path restoration in an ATM network utilizing point to point switched virtual circuits. A source node sends a restore\_setup message to a destination node (Rochberger, col. 14, lines 16-19). In response to this restore\_setup message, the destination node configures its hardware for loopback operation (Rochberger, col. 14, lines 22-24). Then, the destination node sends a restore\_confirm message to the source node (Rochberger, col. 14, lines 27-30). In response to the restore\_confirm, the source node programs its hardware to support loopback (Rochberger, col. 14, lines 38-40).

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Rochberger does not disclose, either expressly or inherently, at least one of: (1) a loop-back path to provide connectivity between the first and second nodes, the first node having a primary connection and a secondary connection, the primary connection carrying the user connections during a normal mode, the secondary connection not using network bandwidth during the normal mode; and (2) a switching element coupled to the loop-back path and the first node to connect the loop-back path to the primary connection during the normal mode and to the secondary connection when there is a failure condition at the primary connection.

Rochberger merely discloses that the Tx buffers are looped back to the Tx direction and the data that would be output to output port is looped back to the switching fabric, at a similar point as data input to the input port (Rochberger, col. 16, lines 16-19). Therefore, the loopback path does not provide connectivity between the first and the second nodes. In addition, Rochberger merely discloses that the source node attempts to calculate a secondary (redundant) path from the source node to the destination node (Rochberger, col. 14, lines 40-43). Therefore, there is no switch element to switch the connectivity from the primary connection to a secondary connection, or to connect the loop-back path to the primary connection during the normal mode and to the secondary connection when there is a failure condition at the primary connection.

Furthermore, Rochberger merely discloses establishing switched virtual circuits. As discussed in the previous response, Rochberger merely discloses configuring the hardware for loopback operation between a destination node and a source node. A destination node configures its hardware for loopback operation in response to a RESTORE\_SETUP message (Rochberger, col. 14, lines 22-24). A source node programs its hardware to support loopback in response to the RESTORE\_CONFIRM message (Rochberger, col. 14, lines 38-40). Accordingly, the loop-back method does not connect to the primary connection or the secondary connection.

Moreover, the path 313 in Rochberger merely shows that the data that would be output to output port 316 is now looped back to the switching fabric, at a similar point as data input to input port 318 (Rochberger, col. 16, lines 30-32). In contrast, in the present invention, the loop-back path is connected to the primary connection during normal mode and to secondary connection when there is a failure condition at the primary connection.

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To anticipate a claim, the reference must teach every element of the claim. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Vergegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ 2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the...claim." Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ 2d 1913, 1920 (Fed. Cir. 1989). Since the Examiner failed to show that Rochberger teaches or discloses any one of the above elements, the rejection under 35 U.S.C. §102 is improper.

Therefore, Applicants believe that independent claims 1, 11, 21, 31, and 41 and their respective dependent claims are distinguishable over the cited prior art references. Accordingly, Applicants respectfully request the rejection under 35 U.S.C. §102(e) be withdrawn.

#### ***Rejection Under 35 U.S.C. § 103***

In the Office Action, the Examiner rejected claims 3-5, 9, 10, 13-15, 19, 20, 23-25, 29, 30, 33-35, 39, 40, 43-45, 49, and 50 under 35 U.S.C. §103(a) as being unpatentable over Rochberger. Applicants respectfully traverse the rejection and submit that the Examiner has not met the burden of establishing a *prima facie* case of obviousness.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *MPEP §2143, p. 2100-129 (8th Ed., Rev. 2, May 2004)*. Applicants respectfully submit that there is no suggestion or motivation to combine their teachings, and thus no *prima facie* case of obviousness has been established.

Rochberger discloses a method of path restoration in an ATM network utilizing point to point switched virtual circuits as discussed above.

Rochberger, taken alone or in any combination, do not disclose, suggest, or render obvious, at least one of (1) a loop-back path to provide connectivity between the first and second nodes, the first node having a primary connection and a secondary connection, the primary



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connection carrying the user connections during a normal mode, the secondary connection not using network bandwidth during the normal mode; (2) a switching element coupled to the loop-back path and the first node to connect the loop-back path to the primary connection during the normal mode and to the secondary connection when there is a failure condition at the primary connection; (3) the failure condition is detected by a network monitor, as recited in claims 3, 13, 23, 33, and 43; (4) a re-route handler coupled to switching element to control the switching element based on a connectivity status between the first and second nodes, the connectivity status indicating the failure condition at the primary connection between the first and second nodes, as recited in claims 4, 14, 24, 34, and 44; and (5) the switching element switches the connectivity based on the connectivity status provided by the network monitor, as recited in claims 5, 15, 25, 35, and 45..

As discussed above, Rochberger does not disclose or suggest elements (1) and (2) above. Therefore, a combination of Rochberger with any other references, including official notice or inherency, in rejecting claims 3-5, 9, 10; 13-15, 19, 20; 23-25, 29, 30; 33-35, 39, 40; and 43-45, 49, and 50, which indirectly depend on claims 1, 11, 21, 31, and 41, respectively, is improper.

Furthermore, the Examiner's arguments regarding the combination are flawed as follows.

Regarding claims 3, 13, 23, 33, and 43, the Examiner contends that "[t]o perform a detection function, it is imperative that some kind of network monitor is provided." Applicants respectfully disagree. Detection and monitoring are two separate functions. One may be performed without the other. Apparently, the Examiner bases the rejections on the theory of inherency. However, the fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. In re Rijckaert, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993). "To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" In re Robertson, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). "In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows

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from the teachings of the applied prior art." Ex parte Levy, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original). Here, as the Examiner points out, Rochberger does not disclose a network monitor. The Examiner has not provided a basis in fact and/or technical reasoning to support the determination that the use of network monitor necessarily flows from the teachings of Rochberger.

Regarding claims 4, 14, 24, 34, and 44, the Examiner contends that Rochberger teaches the transit node #1 including the ports 316 and 318 detecting the break in connection (Office Action, page 6, lines 7-12). Applicants respectfully disagree. Rochberger merely discloses that the break is detected by transit node #1 very quickly since the break is detected by hardware rather than software (Rochberger, col. 16, lines 19-22). A break detection by hardware is not a re-route handler. A hardware break detection merely detects a break, it does not handle the re-route based on a connectivity status.

Regarding claims 5, 15, 25, 35, and 45, the Examiner merely states that it would have been obvious for one of ordinary skill in the art to specifically include a network monitor to provide the connectivity status for the connectivity switching operation (Office Action, page 6, lines 13-20). Applicants respectfully disagree and submit that the Examiner's contention is erroneous. Since the Examiner does not offer any evidence or support for the contention, the Examiner apparently bases the rejections on the theory of inherency. Applicants submit that the Examiner's rejection on inherency is improper. As discussed above, the Examiner has not provided a basis in fact and/or technical reasoning to support the determination that the use of network monitor necessarily flows from the teachings of Rochberger.

There is no motivation to combine Rochberger with any other references. There is no teaching or suggestion that a network monitor or a re-route handler is present. Rochberger, read as a whole, does not suggest the desirability of using a network monitor or a re-route handler. For the above reasons, the rejections under 35 U.S.C. §103(a) are improperly made.

The Examiner failed to establish a prima facie case of obviousness and failed to show there is teaching, suggestion, or motivation to combine the references. When applying 35 U.S.C. 103, the following tenets of patent law must be adhered to: (A) The claimed invention must be considered as a whole; (B) The references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination; (C) The references must be

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viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and (D) Reasonable expectation of success is the standard with which obviousness is determined. Hodosh v. Block Drug Co., Inc., 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986). "When determining the patentability of a claimed invention which combined two known elements, 'the question is whether there is something in the prior art as a whole suggest the desirability, and thus the obviousness, of making the combination.'" In re Beattie, 974 F.2d 1309, 1312 (Fed. Cir. 1992), 24 USPQ2d 1040; Lindemann Maschinenfabrik GmbH v. American Hoist & Derrick Co., 730 F.2d 1452, 1462, 221 USPQ (BNA) 481, 488 (Fed. Cir. 1984). To defeat patentability based on obviousness, the suggestion to make the new product having the claimed characteristics must come from the prior art, not from the hindsight knowledge of the invention. Interconnect Planning Corp. v. Feil, 744 F.2d 1132, 1143, 227 USPQ (BNA) 543, 551 (Fed. Cir. 1985). To prevent the use of hindsight based on the invention to defeat patentability of the invention, this court requires the Examiner to show a motivation to combine the references that create the case of obviousness. In other words, the Examiner must show reasons that a skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the prior elements from the cited prior references for combination in the manner claimed. In re Rouffet, 149 F.3d 1350 (Fed. Cir. 1996), 47 USPQ 2d (BNA) 1453. "To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or implicitly suggest the claimed invention or the Examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references." Ex parte Clapp, 227 USPQ 972, 973. (Bd.Pat.App.&Inter. 1985). The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. In re Mills, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). Furthermore, although a prior art device "may be capable of being modified to run the way the apparatus is claimed, there must be a suggestion or motivation in the reference to do so." In re Mills 916 F.2d at 682, 16 USPQ2d at 1432; In re Fritch, 972 F.2d 1260 (Fed. Cir. 1992), 23 USPQ2d 1780.

In the present invention, the cited references do not expressly or implicitly suggest any of the above elements. In addition, the Examiner failed to present a convincing line of reasoning as

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to why a combination of Rochberger is an obvious application of re-routing connections using redundant path connections and loopbacks.

Therefore, Applicants believe that independent claims 1, 11, 21, 31, and 41 and their respective dependent claims are distinguishable over the cited prior art references. Accordingly, Applicants respectfully request the rejection under 35 U.S.C. §103(a) be withdrawn.

### ***Conclusion***

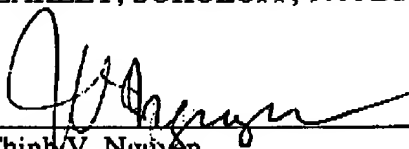
Applicants respectfully request that a timely Notice of Allowance be issued in this case.

Respectfully submitted,

BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP

Dated: May 16, 2007

By

  
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